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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. DAVID CASTRO, Defendant and Appellant.	A154265 (Solano County Super. Ct. No. FCR328887)

After pleading no contest to a single misdemeanor count of violating Penal Code[1] section 273.5, subdivision (a) (injury to a cohabitant), defendant David Castro was sentenced to three years of probation. On appeal, Castro challenges the following conditions of probation: (1) that he seek court permission for any interstate travel; (2) that he abstain from alcohol; (3) that he submit to alcohol testing on demand; (4) that he submit to a warrantless search of his person and property on demand; (5) that he have no "uninvited contact" with his victim, although "peaceful contact" pursuant to "any family, probate, or juvenile court orders" is allowed; and (6) that he stay away from "places where alcohol is the chief item of sale," namely, "bars or liquor stores." We find only the

[1] All subsequent statute references are to the Penal Code, unless otherwise noted.

restriction on interstate travel unreasonable; accordingly, we strike that condition and otherwise affirm.[2]

BACKGROUND

According to the probation officer's presentence report, the victim alleged that on March 13, 2017, Castro returned to their shared home "after a night out of drinking with his friends." She had been sleeping on the couch when Castro arrived, and when she awoke, they argued about the volume of the television. The dispute escalated when Castro "grabbed her by the hair and dragged her to the bedroom," using "his right hand to cover her mouth and [beginning to] suffocate[e] her." Castro "threw [the victim] against the closet, causing [her] to hit her head against the wall," and then "proceeded to punch and kick [her] in the back and abdomen."

When Castro later spoke to police, he claimed that "he attempted to push [the victim] into the bedroom so 'she would leave him alone.' " At that point, the victim bit Castro, and in self-defense, Castro "grabbed [her] by her hair." He denied being intoxicated. In a subsequent statement made to the probation department, Castro maintained that, at the time of the altercation, "he had consumed two beers over a six-hour period and he was not intoxicated."

Pursuant to a negotiated agreement with the District Attorney, Castro pleaded no contest to a single misdemeanor count of violating section 273.5 (injury to cohabitant). At the sentencing hearing, Castro was sentenced to three years' probation. The terms of his probation include the following conditions: (1) no interstate travel without court permission; (2) complete abstinence from alcohol; (3) alcohol testing upon the request of any peace officer; (4) warrantless search and seizure of his person and property upon the request of any peace officer; (5) no "annoy[ing], harass[ing], threaten[ing]" or engaging

[2] Castro objected below to the interstate travel condition on the grounds that it was unreasonable, and we agree. Because we reject on the merits his arguments concerning the other probation conditions, we do not give a comprehensive account of his specific objections in the trial court. For the same reason, we decline to consider the questions of whether he waived appeal by failing to object to certain conditions or whether such failures amount to ineffective assistance of counsel.

in "uninvited contact" with the victim (although—in light of the fact that Castro and the victim have children together—"peaceful contact" pursuant to "any family, probate, or juvenile court orders" is allowed); and (6) stay out of "places where alcohol is the chief item of sale," namely "bars or liquor stores."

This appeal followed.

DISCUSSION

Castro marshals an array of arguments against the six probation conditions challenged here. With respect to the condition requiring him to seek court permission for traveling out of state, Castro contends that the term is both unreasonable and unconstitutionally overbroad, relying primarily on *People v. Lent* (1975) 15 Cal.3d 481 (*Lent*) and *In re Sheena K.* (2007) 40 Cal.4th 875 (*Sheena K.*). Similarly unreasonable under *Lent*, according to Castro, are the requirements that he abstain from alcohol, submit to alcohol testing, and submit to warrantless search and seizure. He further argues that the condition that bars "uninvited contact" but permits "peaceful contact" with the victim is unconstitutionally vague. Finally, Castro contends that his ban from bars and liquor stores is both unreasonable under *Lent* and unconstitutionally vague because it lacks a knowledge requirement. We agree with Castro that the travel restriction is unreasonable but reject his arguments as to the other conditions.

I. Legal Principles

Conditions of probation are reviewed for abuse of discretion. (*People v. Olguin* (2008) 45 Cal.4th 375, 379 (*Olguin*).) "Generally, '[a] condition of probation will not be held invalid unless it "(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality. . . ." [Citation.]' [Citation.] This test is conjunctive—all three prongs must be satisfied before a reviewing court will invalidate a probation term. [Citations.] As such, even if a condition of probation has no relationship to the crime of which a defendant was convicted and involves conduct that is not itself criminal, the condition is valid as long as the condition is reasonably related to preventing future criminality." (*Id.* at pp. 379–380.)

Even where a probation condition is otherwise valid, if it "impinges on constitutional rights," the condition is unconstitutionally overbroad unless "carefully tailored [and] ' "reasonably related to the compelling state interest in reformation and rehabilitation." ' " (*People v. Bauer* (1989) 211 Cal.App.3d 937, 942.) Finally, and irrespective of whether it impinges on other constitutional rights, a probation condition is unconstitutionally vague unless it is " 'sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated.' " (*Sheena K., supra*, 40 Cal.4th at p. 890.)

II. The Requirement That Castro Seek Court Permission For Interstate Travel Is Unreasonable.

Castro argues that requiring him to seek court permission for interstate travel is unreasonable under *Lent*. Accordingly, he must show that the probation condition in question "(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality." (*Lent, supra*, 15 Cal.3d at p. 486.) Here, Castro was convicted of inflicting injury on a cohabitant, a crime lacking any relationship to interstate travel. And, of course, such travel is not in itself criminal. Thus, the only question in this case is whether the condition in question requires or forbids conduct that is not reasonably related to future criminality.

People v. Soto (2016) 245 Cal.App.4th 1219 (*Soto*) provides the answer. In that case, the court reviewed a probation condition imposed on a defendant convicted of driving under the influence. (*Id*. at p. 1225.) Soto "was ordered to '[n]ot change [his] place of residence from Monterey County or leave [the] State of California without permission of the probation officer or further order of the court.' " (*Ibid*.) Because "there [was] nothing in the record to indicate that [Soto's] living situation contributed to his crime or would contribute to his future criminality," *Soto* found the probation condition unreasonable under *Lent*. (*Soto,* at p. 1228.) Likewise, here, the record is devoid of any indication that interstate travel contributed to Castro's crime of conviction or would contribute to Castro committing other crimes in the future. Thus, for the same

reason that the probation condition in *Soto* was unreasonable under *Lent*, so too is the condition reviewed here.

While the People cite several authorities for the proposition that restrictions on interstate travel are not always unconstitutionally overbroad, the People cite only *People v. Moran* (2016) 1 Cal.5th 398 (*Moran*) in response to Castro's contention that the condition is unreasonable under *Lent*.[3] Moran was convicted of stealing from a Home Depot store. (*Moran*, at p. 401.) When the trial court granted probation, the terms included the condition that Moran stay away from all Home Depot stores in the state. (*Ibid*.) Applying the three-part *Lent* test, our Supreme Court upheld that condition on the grounds that it directly related to Moran's crime of stealing from a Home Depot, thus failing to meet the first *Lent* criterion. The *Moran* court further found that "that the condition also fails *Lent*'s third factor for invalidity, because prohibiting [Moran] from entering Home Depot stores is reasonably directed at curbing his future criminality by preventing him from returning to the scene of his past transgression and thus helping him avoid any temptation of repeating his socially undesirable behavior." (*Moran*, at p. 404.)

Neither of the *Moran* court's reasons for upholding the contested probation condition in that case supports the requirement that Castro seek court permission for interstate travel. As noted above, in contrast to the relationship between Moran's presence at and theft from a Home Depot, there is no relationship between Castro's infliction of injury on a cohabitant, on one hand, and the possibility of Castro's interstate travel, on the other. Moreover, there is no reason to believe that requiring Castro to seek permission for interstate travel would "help[] him avoid any temptation of repeating his" crime. (*Ibid*.) In short, nothing in *Moran* supports the People's position that the travel restriction condition is reasonable under *Lent*.

[3] Even then, the quotation from *Moran* cited by the People—discussing the prevalence of "limitation[s] on probationers' movements as a condition of probation"—appears in *Moran*'s discussion of overbreadth, not reasonableness under *Lent*. (*Moran*, at p. 406.)

For that matter, neither does anything in *Olguin*, also cited by the People. In *Olguin*, our Supreme Court held that insofar as "[p]roper supervision [of a probationer] includes the ability to make unscheduled visits and to conduct unannounced searches of the probationer's residence," a probation "condition requiring notification of the presence of pets is reasonably related to future criminality because it serves to inform and protect a probation officer charged with supervising a probationer's compliance with specific conditions of probation." (*Olguin*, *supra*, 45 Cal.4th at p. 381.)

However, as the *Soto* court observed, "*Olguin* . . . is distinguishable" from cases in which probation conditions require court approval for certain actions: "The condition at issue in *Olguin* required the defendant to *notify* his probation officer if he had pets; it did not require the defendant to obtain *approval or permission*. Several times, the *Olguin* court distinguished the probation condition at issue there from a condition that would require the defendant to obtain *approval* before having a pet." (*Soto*, *supra*, 245 Cal.App.4th at p. 1227.) Here, the probation condition in question does, in fact, require Castro to obtain approval or permission before leaving the state, thus falling squarely within the *Soto* analysis and outside the scope of *Olguin*.

In sum, the probation condition requiring Castro to seek court approval before leaving the state is unreasonable under *Lent*.[4]

III. The Alcohol-Related Conditions Are Not Unreasonable.

Castro argues that three alcohol-related probation conditions imposed by the sentencing court are also unreasonable under *Lent*. These alcohol-related conditions consist of abstinence from alcohol, submission to alcohol testing, and avoidance of "places where alcohol is the chief item for sale." We disagree with Castro and find these conditions reasonable.

In approving a no contest plea to a misdemeanor offense, the trial court is not required to satisfy itself that there is a factual basis for the plea. (*In re Gross* (1983)

[4] Because Castro prevails on the grounds that the condition is unreasonable under *Lent*, we do not reach the question of whether it is unconstitutionally overbroad.

33 Cal.3d 561, 567.) In imposing sentence (including the decision whether to grant probation), "[t]he court may also consider and rely upon hearsay statements contained in a probation report, including the police reports used to prepare the crime summaries contained in the report." (*People v. Tran* (2015) 242 Cal.App.4th 877, 888, fn. 5 (*Tran*).) "[O]ur Supreme Court found that a sentencing court could consider a probation report containing hearsay statements because the report was inherently reliable as a document prepared by a government employee in furtherance of his or her official duties." (*People v. Cain* (2000) 82 Cal.App.4th 81, 87.)

Here, Castro pleaded no contest to a misdemeanor charge, so there was no requirement that he stipulate to a factual basis for the plea. However, the probation report on which the sentencing court relied included the victim's statement that Castro inflicted injury on her "after a night out of drinking with his friends." Because the same report also notes that Castro denied being inebriated, Castro argues that his own "testimony is more reliable on that point" and should therefore serve as the factual background for this court's application of the *Lent* test.

However, in reviewing the probation report and imposing alcohol-related probation conditions, the trial court made an implicit factual finding that Castro's drinking was related to the crime. The trial court did so on the basis of evidence it was entitled to consider for the purposes of determining an appropriate sentence and fashioning conditions of probation. (*Tran, supra,* 242 Cal.App.4th at 888, fn. 5.) Thus, by asking this court to make a contrary factual finding, Castro is essentially offering an argument based on purported insufficiency of the evidence to support the alcohol-related conditions.

"In reviewing sufficiency of the evidence, we view the evidence in the light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Lewis* (1990) 50 Cal.3d 262, 277.) Here, notwithstanding Castro's denial that he was intoxicated, the probation report included a statement from the victim alleging that Castro had been out drinking before attacking her. The victim was a witness to Castro's behavior and

demeanor at the time of the crime; her statement thus furnished the trial court with substantial evidence to support the finding that Castro was drinking on the night in question and that his drinking had a relationship with the crime of conviction. (*Lent, supra,* 15 Cal.3d at p. 486.)

In light of the record and standard of review, we reject Castro's argument that the alcohol-related probation conditions are unreasonable.

IV. The Warrantless Search Condition Is Not Unreasonable.

Castro also asserts that the requirement that he submit his person and property to a warrantless search is unreasonable under *Lent*. In *People v. Balestra* (1999) 76 Cal.App.4th 57, the Fourth District upheld such a condition as applied to a defendant convicted of elder abuse, even though that offense was unrelated to "theft, narcotics, or firearms." (*Id*. at p. 67.) As the *Balestra* court noted, "[i]nsofar as a probation condition serves the statutory purpose of ' "reformation and rehabilitation of the probationer,' (§ 1203.1) it necessarily follows that such a condition is "reasonably related to future criminality" and thus may not be held invalid whether or not it has any 'relationship to the crime of which the offender was convicted." ' " (*Id*. at p. 65.) A warrantless search serves the rehabilitative purpose of "ensur[ing] that the subject thereof is obeying the fundamental condition of all grants of probation, that is, the usual requirement (as here) that a probationer 'obey all laws.' " (*Balestra,* at p. 67.) Thus, it was irrelevant that Balestra's crime had nothing to do with concealing contraband; the warrantless search condition was nonetheless reasonable.

The same analysis applies here. Castro's crime did not involve concealing contraband, but he is obligated by the terms of his probation to "obey all laws." (*Balestra, supra,* 76 Cal.App.4th at p. 67.) The probation officer charged with supervising Castro's rehabilitation can do so more effectively if able to search Castro,

thereby ensuring that Castro is complying with all probation conditions. In short, there is nothing unreasonable about the warrantless search condition.[5]

V. None of the Conditions Is Vague.

Castro argues that two of his probation conditions are unconstitutionally vague. As to the requirement that he have only "peaceful" and no "uninvited" contact with the victim, Castro argues that the condition is unconstitutionally vague both because it lacks a knowledge requirement and because the phrase "peaceful contact" is susceptible to a variety of meanings. He further asserts that the prohibition on him being in "places where alcohol is the chief item for sale," namely "bars or liquor stores," is likewise vague due to its lack of a knowledge requirement.

We first address Castro's concerns regarding the lack of an explicit knowledge requirement. "[T]he underpinning of a vagueness challenge is the due process concept of 'fair warning.' " (*Sheena K.*, *supra*, 40 Cal.4th at p. 890.) If it is to withstand a vagueness challenge, "[a] probation condition 'must be sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated.' " (*Ibid.*) Moreover, "[a] probation condition should not be invalidated as unconstitutionally vague ' " 'if any reasonable and practical construction can be given to its language.' " ' " *People v. Hall* (2017) 2 Cal.5th 494, 501 (*Hall*) [rejecting vagueness challenge and upholding condition barring probationer from possessing firearms or illegal drugs, notwithstanding lack of express knowledge requirement].)

As the Sixth District observed in *People v. Hartley* (2016) 248 Cal.App.4th 620 (*Hartley*), it is an "established principle that 'a probation violation must be willful to justify revocation of probation. [Citations.] . . . "[A] crime cannot be committed by mere

[5] As the People point out, Castro's reliance on *In re Martinez* (1978) 86 Cal.App.3d 577, is misplaced insofar as *Martinez* employs the reasoning of the Fourth District's decision in *People v. Keller* (1978) 76 Cal.App.3d 827. The Fourth District later expressly rejected *Keller* as being "inconsistent with subsequent case authority from both the United States and California Supreme Courts." (*Balestra,* at p. 68.)

misfortune or accident." ' " (*Id*. at p. 634.) Accordingly, although courts may find probation conditions vague for "lack [of] an essential knowledge element with respect to *who* or *what* the probationer was to avoid" (such as where a condition prohibits a probationer from having contact with " 'anyone disapproved of by probation,' " *(Sheena K., supra,* 40 Cal.4th at p. 889), no such "express knowledge element" is required "with respect to the act of making contact." (*Hartley,* at p. 633.)

Here, the trial court clearly specified "*who* and *what* [Castro] was to avoid": uninvited contact with the victim, as well as bars and liquor stores. (*Hartley, supra,* 248 Cal.App.4th at p. 633.) Having notice of those terms, Castro received fair warning as to what is required of him. The knowledge requirement is implied by established principles of criminal law, as noted in *Hartley*.[6] (*Id.* at p. 634.) In sum, neither of the probation conditions in question is unconstitutionally vague for lack of an explicit knowledge requirement.

As to the condition that permits him to have "peaceful contact" with the victim pursuant to "any family, probate, or juvenile court orders," Castro contends that the phrase "peaceful contact" is unconstitutionally vague because it may be defined in a variety of ways. In so arguing, he relies on *In re G.B.* (2018) 24 Cal.App.5th 464 (*G.B.*). There, Division One of this court found unconstitutionally vague a probation condition requiring the defendant to "have 'peaceful' contact with and not act 'aggressively' toward law enforcement." (*Id.* at p. 473.)

However, *G.B.* expressly distinguishes itself from cases in which the subject of the "peaceful contact" is the victim. In a footnote commenting on the Attorney General's failure in *G.B.* to "identify any applicable legal definition of either 'peaceful' or 'aggressive' " (*G.B., supra,* 24 Cal.App.5th at p. 474), the *G.B.* court noted that

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[6] The *Hartley* court also addressed *People v. Petty* (2013) 213 Cal.App.4th 1410, cited by Castro, in which Division Two of this district modified "the protective order to provide that defendant must not 'knowingly' come within 100 yards of the victim or her daughter." (*Id.* at 1424–1425.) "Other than noting that the modification was made at the 'defendant's request,' . . . the court in *Petty* offered no rationale for the modification." (*Hartley, supra*, 248 Cal.App.4th at p. 635.)

"restraining orders and probation conditions mandating 'peaceful contact' with witnesses or victims are common, and have been referenced in several published decisions. [Citations.] We have not encountered in our case law, however, any example of a probation condition requiring 'peaceful contact' with *law enforcement,* nor have the parties cited to one." (*Id.,* at p. 474, fn. 6.)

Here, the probation condition relates to "peaceful contact" with the victim, not law enforcement. Moreover, a careful reading of the entire probation order brings the meaning of "peaceful contact" into sharper focus. First, the "peaceful contact" contemplated by the probation conditions is connected to "family, probate, or juvenile court orders." Second, Castro is not to "annoy, harass, or threaten" the victim. Third, the contemplated "peaceful contact" is an exception to the prohibition on "uninvited contact" with her. Thus, a scenario might arise in which the victim was uninterested in contact with Castro, but a family court order effectively required the two to have some contact regardless. Such a scenario would represent an exception to the "no uninvited contact" rule. In that context, the requirement that all contact be "peaceful" notifies Castro that while the "no uninvited contact" rule might be temporarily suspended, the requirement that he refrain from "annoy[ing], harass[ing], or threaten[ing]" the victim is always in effect. Read in this commonsense manner, the term "peaceful contact" does not present a situation in which " 'people of common intelligence must necessarily guess at [the phrase's] meaning and differ as to its application.' " (*Hall, supra,* 2 Cal.5th at p. 500.) The requirement that Castro have only "peaceful contact" with the victim is sufficiently precise to inform Castro what conduct is required of him. (*Sheena K., supra,* 40 Cal.4th at p. 890.)

We therefore reject Castro's claims that his conditions of probation are unconstitutionally vague.

DISPOSITION

The probation condition that Castro "must obtain the court's permission to leave the state of California" is stricken. In all other respects, the judgment is affirmed.

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BROWN, J.

WE CONCUR:

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POLLAK, P. J.

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TUCHER, J.